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Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1049

ARNOLD SCHULMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, FIRST DEPARTMENT

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No. .....

ARNOLD SCHULMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, FIRST DEPARTMENT

To the Honorable Warren E. Burger, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by Arnold Schulman for a writ of certiorari to review a judgment and order of the Supreme Court of the State of New York, Appellate Term, First Department, entered in the above cause.

I. Court Opinions

The trial court did not write an opinion. Neither the majority opinion nor the dissent in the Appellate Term (Appdx. A1-9) entered on May 15, 1972 are reported.

The Court of Appeals did not write an opinion. The Certificate Denying Leave, as yet, is unreported.

II. Jurisdictional Statement

The final order and judgment, dated May 11, 1972 docketed May 15, 1972, is from a state court of last resort. The Court of Appeals of the State of New York is the highest court in the state to which application was made for permission to appeal pursuant to Criminal Procedure Law §460.20. Leave was denied by certificate of October 31, 1972 docketed the same day (Appdx. B3).

The statutory provision believed to confer on this Court jurisdiction to review the order and judgment, is section 1257(3) of Title 28 of the United States Code; in that claim was made under the Constitution of the United States to a right, privilege or immunity.

III. Question Presented

Upon the facts in this petition, was petitioner twice placed in jeopardy within the Fifth Amendment clause of the United States Constitution?

IV. Statutes Involved

The local rules and statutes involved in this petition are:

CHAPTER 19

Department of Marine and Aviation *

Rules and Regulations

1. *Definition.—For the purposes of these rules and regulations.* The term "wharf property" shall mean wharves, piers, docks and bulkheads and structures thereon and slips and basins, the land beneath any of the foregoing, and all rights, privileges, and easements appurtenant thereto, and land under water in the port of New York, and such upland or made land adjacent thereto as is vested in the Department of Marine and Aviation or may be assigned to it.

* * *

5. *Filling in of wharf property.* Filling in of any wharf property in the City of New York, whether owned by The City of New York or privately-owned, is prohibited except by written permission of the Commissioner of Marine and Aviation.

PENAL LAW

Article 10

Definitions

§10.00 *Definitions of terms of general use in this chapter.*—Except where different meanings are expressly specified in subsequent provisions of this chapter, the following terms have the following meanings:

1. "Offense" means conduct for which a sentence to a term of imprisonment or to a fine is provided

* The City Charter §712 provides for punishment by imprisonment not exceeding 30 days for a violation of the regulation.

by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same.

2. "Traffic infraction" means any offense defined as "traffic infraction" by section one hundred fifty-five of the vehicle and traffic law.

3. "Violation" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.

4. "Misdemeanor" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.

5. "Felony" means an offense for which a sentence to a term of imprisonment in excess of one year may be imposed.

6. "Crime" means a misdemeanor or a felony.

V. Statement of Case

On February 27, 1965, petitioner purchased 240 Bowne Street on City Island in the Borough of the Bronx, City of New York. The property's parcel B whose width is 25 feet on Long Island Sound is bounded on the north by the center line of Bowne Street, if extended. The full width of Bowne Street, if extended, on Long Island Sound is 50 feet.

The buildings on petitioner's parcel A (74.03 feet in width) are residential. There are no wharfs, piers or bulkheads on any part of the entire premises.

The City of New York, as owner of parcel B, on May 4, 1954, conveyed the same to Mrs. A. H. Robinson by deed[1] granting to her:

> All that certain piece or parcel of land together with any improvements thereon . . . on the Tax Map . . . as Lot 286 in Block 5645 of Section 18 . . . as said map was on February 4, 1952.

There are no reservations or restrictive covenants therein as to use.

Taxes on the entire parcel B were paid by the grantee and her grantee,[2] Virginia MacRae, who is petitioner's grantor. Parcel B, neither is vested in nor assigned to the Commissioner of Marine and Aviation.

On January 25, 1967, petitioner applied to the Department of Marine and Aviation for a work permit:[3]

> To fill in with trap rock and earth fill extending into Long Island Sound. To prevent further land erosion and protect dwelling.
>
> At the foot of Bowne St. South Side.

On October 16, 1967 the permit was authorized,[4] but not until petitioner first agreed in writing on October 3, 1967,

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[1] Recorded in the Register's Office, Liber 2085 of conveyances Page 271.

[2] Recorded in the Register's Office, Liber 2367 of conveyances Page 247.

[3] People's Ex. 2, r.-p.21; exhibit not in record—to be supplied by the People.

[4] See footnote 3 supra.

this though, there is no rule, regulation, code, statute nor deed reservation requiring the same, that:

> By the issuance and acceptance of this permit, the permittee agrees that he will not obstruct the right of access or the riparian rights in favor of the City of New York or the public in, to or over any portion of the land to which this permit relates lying within the lines of Bowne Street, if extended, and the permittee agrees for himself, his heirs and assigns, that he, or his heirs or assigns, will construct and maintain suitable facilities to afford access by the public to Long Island Sound over and across the portion of said land lying within the lines of Bowne Street, if extended.

In 1968, petitioner graded his parcel B with trap rock to the center line of Bowne Street, if extended, up to the grade of his adjacent parcel A, leaving untouched public access to that portion of Bowne Street, if extended, from the center line thereof, 25 feet south.[5]

In August, 1969, petitioner was served with a summons[6] for non-compliance with his work permit. For grading his parcel B, as aforementioned, he was found guilty after trial on October 29th the same year of a misdemeanor, a crime within the meaning of Penal Law Sec. 10 subdivs. 3, 4 and 6 and fined $50.00 or in default of payment imprisonment not to exceed ten days. The trial court did not explicitly reserve jurisdiction for resentence in the event of non-compliance.[7] The fine was paid by petitioner. No appeal is pending from the judgment of conviction. The period within which to appeal therefrom long since has expired.

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[5] See m.-p.25.

[6] See docket no. 6281, Bx. Cty Cr. Ct. of the C. of N. Y.

[7] See r.-p.12, m.-p.4.

In May, 1970, petitioner was served with another summons, in the same court, for, according to the Law Department's representative who tried the first proceeding:

the same violation.[8]

After a three day trial on a charge in the information of, unauthorized filling in foot of Bowne Street, petitioner was found guilty on July 10, 1970, fined $50.00 and given three months to remove the violation, reserving jurisdiction for resentencing.[9]

The federal question first was raised at the very outset of the second trial by motion to dismiss and by a supporting brief. The trial Court denied the motion to dismiss.[10]

The federal question was raised in the Appellate Term by the first pleading to that court—the notice of appeal. The Appellate Term, in their majority opinion, found petitioner's claim of having been twice placed in jeopardy for the same offense is without merit.[11]

Epilogue

The dissenting memorandum calls for a remand of the matter to the civil courts where civil disposition would further the interests of justice.

In October, 1970, petitioner instituted a civil court proceeding pursuant to CPLR Art. 78.[12] On motion of respondent here the proceeding there was dismissed on the merits, without trial, in April, 1971.

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[8] See m.-p.2, r-p.10. Procedurally were the second matter a resentence, petitioner would have been brought before the trial court on motion for resentence.

[9] See r.-pp.127, 128, m.-pp.119, 120.

[10] See r.-p.12, m.-p.4; r.-p.16, m.-p.8.

[11] See r.-p.3.

[12] See docket no. 15297—1970—Sup. Ct. Bx. Cty.

VI. Purpose for Allowance of Writ

The Appellate Term decided the federal question of substance in favor of respondent in conflict with the *Appleby* decisions of this Court in 271 U. S. 364; 271 U. S. 403 and *Benton* v. *Maryland*, 395 U. S. 784.

VII. Relief Requested

Petitioner respectfully prays this Court issue a writ of certiorari to review the order and judgment of the Supreme Court of the State of New York, Appellate Term, First Department.

January 25, 1973.

.....

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Appendix A

APPELLATE TERM OF THE SUPREME COURT

FIRST DEPARTMENT

November, 1971

Present:

HON. VINCENT A. LUPIANO, J. P.
" JACOB MARKOWITZ,
" PETER A. QUINN,
Justices.

#468

THE PEOPLE OF THE STATE OF NEW YORK
On the Complaint of RALPH A. DE LILLO,

Respondent,

against

ARNOLD SCHULMAN,

Defendant-Appellant.

Appeal by defendant from a judgment of the Criminal Court of the City of New York, County of Bronx.

PER CURIAM: There can be no doubt that the easterly foot of Bowne Street, a public thoroughfare and mapped street, leading to Long Island Sound in the Borough of The Bronx, is wharf property. Former Chapter 29 of the New York City Charter gave the Commissioner of Marine and Aviation full power of regulation over wharf

property (Sec. 704, c, 1), with authority to make rules and regulations and issue permits respecting the maintenance, use and filling in of such property (Sec. 712). Violations of such rules and regulations were explicitly made triable before a magistrate's court with fine, or imprisonment or both, prescribed as punishment (Sec. 712). Local Law 67 of the New York City laws of 1969 amended the City Charter, repealed Chapter 29 and continued in the New York City Transportation Administration, and such bureaus and departments as it might subdivide into, all the rights, powers, duties, etc., of its predecessor agencies together with the rules, regulations, laws and sanctions under which they operated (Secs. 4 to 9 incl. of Local Law 67, supra).

Defendant owns the *bed* of the southerly half of the easterly foot of Bowne Street, leading to Long Island Sound, to the center line thereof. Defendant's ownership of the *bed* of half of the foot of Bowne Street leading to Long Island Sound is subject to the dominant public easement over the whole width of Bowne Street and the dominent riparian rights of the public to the whole width of Bowne Street as wharf property, where it leads to Long Island Sound, including that portion of it within the northerly boundary of defendant's bed-of-street property line. It is not disputed that a duly promulgated rule of the Department of Marine and Aviation (continued as a rule of the Department of Ports and Terminals of the Transportation Administration) forbids the filling in of wharf property except by written permission of the regulatory agency. For the purpose of affording defendant opportunity to better protect the easterly boundary of his property, bordering Long Island Sound, from the erosive effects of wind and wave, he was granted a limited permis-

sion, according to an approved plan, in evidence, to fill a portion of the dominant wharf property of Bowne Street (the servient bed of which he owns) between the southerly line of Bowne Street and a line ten feet south of the center line of the street. There was thus left as wharf property, forbidden to be filled, the whole northerly half of Bowne Street and a ten-foot strip south of the center line of the street. Defendant was found guilty of unlawfully filling in the wharf property comprising this ten-foot strip, i.e., filling it in without the written permission of the regulatory agency. The permission granted him did not include this ten-foot strip, so that in depositing fill on this portion of wharf property he exceeded the limits of the permission granted him and violated the rule making this act unlawful, for which punishment by fine or imprisonment is prescribed in the City Charter as noted above. The regulatory agency could have denied him permission to deposit any fill in any part of the dominant wharf property between the lines of Bowne Street for its full width (including the portion over the servient one-half bed of the street owned by him) and if defendant felt aggrieved his only recourse would have been an Article 78 proceeding to review the denial of permision as unreasonable and arbitrary. His situation is no different because he was granted a limited permission requiring him to keep the edge, or toe, of the sloped fill, ten feet south of the center line of Bowne Street (see plan, pltff's ex. 1). His plaint that this ten-foot limit in the permit granted him is "stupid" will not bear careful analysis, in our view. But that is not for us, nor was it for the trial court, as Judge DiFede there observed, to decide or even to consider. Until a court of competent jurisdiction strikes it down as unreasonable or arbitrary, it must be accepted as

a reasonable limitation on the permission to fill wharf property granted the defendant; by acting in excess of which he violated the penally-binding rule against filling in wharf property without permission.

Whether or not fill was deposited and continued as a deposit by defendant in the forbidden areas of the wharf property, was a question of fact which the trial court resolved against defendant after a full, fair trial. The weight of the evidence, turning largely on questions of credibility of the witnesses was ample to support the finding of defendant's guilt beyond a reasonable doubt.

The defendant's claim of having been twice placed in jeopardy for the same offense is without merit. His prior conviction for unauthorized filling-in on October 29, 1969 for which he paid a fine of $50., certainly could not be regarded as permission to maintain the unlawful condition indefinitely. When the violation charged is a continuing one, as here, conviction or acquittal bars later prosecution only for a like offense during the time specified in the first charge (People v. Farson, 244 N. Y. 413, 419; 22 C. J. S. 732). The instant offense was the condition existing on May 7, 1970 which, of course, is subsequent and completely distinct from October 29, 1969, the time specified in the first charge.

The judgment of conviction is affirmed.

APPELLATE TERM DISSENTING MEMORANDUM

MARKOWITZ, J.

Bowne Street, City Island, is at the location here involved, a map street only. It runs east and west. Defendant owns 240 Bowne Street, facing the southerly line

of Bowne Street, as extended. A sea wall, on the northerly side of defendant's property, and running diagonally east and south, separates the property from the mapped street. To the east of the street, if extended, is Long Island Sound. Defendant's property extends to the east 400 feet into the Sound. Defendant owns the southerly half of Bowne Street, as extended, in front of his property, a predecessor in interest having bought this half of the mapped street from the City of New York in May of 1954. In short, we deal with a street contemplated for the future, running easterly into the Sound, the southerly half of which is owned by defendant.

In October of 1967, defendant was granted a permit to fill in with trap-rock and earth the easterly portion of his property, including part of the portion of Bowne Street owned by him, to prevent land erosion and to protect his dwelling. Defendant agreed that by the acceptance of the permit defendant would "not obstruct the right of access or the riparian rights in favor of the City of New York or the public in, to or over any portion of the land to which this permit relates lying within the lines of Bowne Street, if extended"; defendant also agreed, for himself, his heirs and assigns, that he would "construct and maintain suitable facilities to afford access by the public to Long Island Sound over and across the portion of said land lying within the lines of Bowne Street, if extended" (Exhibit 2). Thus, so far from proscribing filling in the street, the permit contemplated the construction and maintenance of facilities over the street to afford the public access to the Sound.

The Plan fixed the northern line of the trap-rock at ten feet south of the center line of mapped Bowne Street, al-

though defendant's title extended to the center line of the street. It is the filling in by defendant of these ten feet (by eighty-five feet) between the planned northern line of the trap-rock and the center line of Bowne Street, if extended, that has caused the trouble at bar.

In 1969, the City brought the dispute between the parties to the Criminal Court. Defendant was found guilty and fined $50 for filling in the ten feet. The City says defendant was also told to remove the fill within 90 days and that it has not been removed. Defendant says he did comply; that he had engaged a bulldozer to remove the claimed excess fill; that the bulldozer worked for three hours; and that what the City's inspector found there resulted from storms on the Island.

The City's inspector argued that the fill-in, the 10′ x 85′ strip, 10 feet deep, could not be removed in three hours—it required two days work. He agreed that there is no code provision or other law which requires an owner of property, when improving it, to keep 10 feet away from his boundary. It was a matter of policy, he said, adopted to prevent fill from running on to an adjoining owner's property.

1. The summons before us charged defendant with "unauthorized filling-in" on May 8, 1970, of the foot of Bowne Street, in violation of the rules and regulations of the Department of Marine and Aviation. The summons did not indicate the rule claimed to have been violated. In my view, the words "unauthorized filling-in" without reference to the specific rule claimed to have been violated, are too vague to have given defendant proper notice of the charge made against him. (People v. McGuire, 5 N Y 2d 523).

2. Respondent's brief points to Rule 5 as the rule violated. This rule was adopted under section 704 c-1.0 of the Administrative Code, which calls for a written permit from the Commissioner of Marine and Aviation (a) before any building or other construction or obstacle is placed or maintained on waterfront property "owned by the City and under the charge of and control of the department"; (b) for the erection of such structures or the placing and maintenance of such devices "on any other waterfront property when used in conjunction with and in furtherance of waterfront commerce and/or navigation"; and (c) "before any piles shall be driven, or any filling-in or construction, repairs, alterations, removal, dredging or demolition of any kind be made on any part of the waterfront, except as may be otherwise provided by the charter or admniistrative code of the city of New York".

The only criminal penalty in the Administrative Code relating to this section pertains to the unauthorized construction and maintenance of structures on waterfront property (Adm. Code, § 704c-2.0). Defendant was not charged with constructing or maintaining a structure on waterfront property. No criminal penalty is set forth in this section for filling in waterfront property without authorization. The summons is thus without statutory foundation.

3. The trial judge found that defendant had tried to correct the condition complained of but had not succeeded. Whether or not this is so, the fact remains that the dispute between the parties basically comes down to whether in fact what defendant did was or was not sufficient to remove the unauthorized fill. To put it differently, the crux of this prosecution is not that defendant filled in the ten feet without authority (this was the subject of the first

prosecution), but that he failed to remove the fill when ordered by the City to do so. This is not the offense with which he was charged.

4. In any event, the problem at hand lends itself much more effectively to a civil disposition, in law or in equity, than to a criminal action (see: People v. Brooklyn & Queens Transit Corp., 283 N. Y. 484, 492, 495-496). Where the difference between the parties is whether a bulldozer worked only three hours, when it should have worked two days, turning the situation into a criminal prosecution, rather than considering the matter a civil problem, is to invite multiple prosecutions; if failure satisfactorily to remove the fill is deemed a continuing criminal violation, conceivably successive judges may be asked to pass upon the question, whatever defendant may hereafter do, until a judge again finds that defendant acted improperly (People v. Brooklyn & Queens Transit Corp., *supra,* p. 496). Such a result is undesirable even if multiple prosecutions for the same underlying offense do not constitute double jeopardy. If, on the other hand, the parties are relegated to the civil courts, relief can be fashioned to meet the need and as may be appropriate. In this context, the interests of justice call for remand of the matter to the civil courts.

I do not agree that defendant's ownership of the bed of half of Bowne Street as mapped is subject to a dominant public easement over the mapped street. A mapped street is but a proposed street. It does not thereby, ipso facto, become a public street; nor is an easement, ipso facto, thereby created (De Long Realty Corp. v. Levkoff, 14 Misc 2d 715, 718, 719, 720; City of Buffalo v. Clement Co., 28 N Y 2d 241; 76 Crown Street Corp. v. City of New York,

35 A D 2d 1005; see also DiBiasi v. City of New York, 19 A D 2d 323, 326-327, aff'd 14 N Y 2d 711; Kresge v. City of New York, 194 Misc. 645, 646, aff'd 275 App. Div. 1036; see also Headley v. City of Rochester, 272 N. Y. 197).

I also do not agree that the sanctions provided in former section 712 of the Charter were kept alive by the transfer of the rights, powers and duties of the Commissioner of Marine and Aviation to the Transportation Administration by Local Law 67 of 1969. Repealed criminal provisions may not constitutionally be continued in force and effect in this indirect fashion.

I would accordingly dismiss the complaint on the law.

Moreover, and independent of the legal impediments to this prosecution listed above, I find, on the evidence, that the guilt of defendant was not established beyond a reasonable doubt.

I therefore dissent, and vote to reverse the judgment of conviction and to dismiss the complaint.

Appendix B

At an Appellate Term of the Supreme Court, First Department, held at the Court House, Borough of Manhattan, City of New York, on the 11th day of May 1972.

Present:—

Hon. Vincent A. Lupiano, J. P.
" Jacob Markowitz (dissenting)
" Peter A. Quinn, Justices

Bronx County Clerk's No. 1029 1972

November 10, 1971

No. 468

The People of the State of New York,

Respondent,

vs.

Arnold Schulman,

Defendant-Appellant.

An appeal having been taken to this court by defendant from a judgment of conviction of the Criminal Court of the City of New York, County of Bronx, after trial before Hon. Joseph De Fede, on the 10th day of July 1970, upon the charge of unauthorized filling in foot of Bowne Street, and having been sentenced by Hon. Joseph De Fede on the 10th day of July, 1970, as follows:

$50.00 with direction to remove violations within three months and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgment so appealed from be and the same is hereby affirmed.

Enter

[initial of Justice signing the order]
Justice Appellate Term
Supreme Court, First Department

Filed
May 15, 1972
Bronx County Clerk's Office

Appendix B

CERTIFICATE DENYING LEAVE

STATE OF NEW YORK
COURT OF APPEALS

Before:

HON. ADRIAN P. BURKE, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

ARNOLD SCHULMAN,
Defendant-Appellant.

I, ADRIAN P. BURKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated Albany, New York
October 31, 1972

ADRIAN P. BURKE
Associate Judge

---

*Description of Order: Order of the Appellate Term, First Department, dated May 11, 1972 affirming the judgment of conviction of the Criminal Court, Bronx County.

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FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1049

ARNOLD SCHULMAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Bryant v. Zimmerman, 278 U. S. 63 (1928)	4
Oxley Stave Co. v. Butler County, 166 U. S. 648 (1897)	4
People v. Brooklyn & Queens Transit Corp., 283 N. Y. 484, 28 N. E. 2d 925 (1940)	3
People v. Farson, 244 N. Y. 413, 155 N. E. 724 (1927)	3
People ex rel. Lichtenstein v. Hodgson, 126 N. Y. 647, 27 N. E. 378 (1891)	3
Self v. United States, 150 F. 2d 745 (4th Cir., 1945)	3
United States v. Bendik, 220 F. 2d 249 (2d Cir., 1955)	3

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Other Authorities Cited

22 C. J. S., Criminal Law:

Sec. 281 3

New York City Charter:

Sec. 704 2

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Stern & Gressman, Supreme Court Practice (1969):

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1049

ARNOLD SCHULMAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner seeks to have this Court review by writ of certiorari an order of the Appellate Term of the New York State Supreme Court, First Department, entered on May 15, 1972, which (2 to 1) affirmed a judgment of conviction of the New York City Criminal Court upon a charge of unauthorized filling in of wharf property.

In a certificate dated October 31, 1972, the New York Court of Appeals denied leave to appeal.

Issue Presented

Has petitioner twice been placed in jeopardy when he has been guilty of a continuing violation of law and when the second prosecution relates to a period of time not embraced in the first prosecution?

Facts

A detailed statement of facts is set forth in the opinion at the Appellate Term, found in Appendix A of petitioner's brief to this Court. We will reiterate only those facts strictly relevant to the issue of double jeopardy.

Petitioner owns certain waterfront property adjacent to Long Island Sound in City Island, New York. Such property is subject to regulation under New York City Charter §§ 704 and 712. Petitioner applied for, and was granted, a permit to fill in his lot with trap rock and earth fill in order to prevent erosion and protect his dwelling. This permit was granted with certain specified limitations. Petitioner exceeded these limitations and, as a result, was served with a criminal summons in October 1969 charging him with unauthorized filling in. He was convicted and fined $50 (R. 3-4).* No appeal was taken from this conviction.

Petitioner did not correct the unauthorized condition. On May 7, 1970, he was served with another summons charging him with unauthorized filling in (R. 5-8). He was found guilty, fined $50 and given three months to remove the violation (R. 128).

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* References are to numbers as they appear at the bottom of the pages of the Record.

On appeal, the Appellate Term sustained the conviction by a 2 to 1 vote (Pet's Append. A). The majority rejected petitioner's claim of double jeopardy (A4). The dissent did not pass on the issue (A8).

ARGUMENT

Petitioner was not placed in double jeopardy. He was guilty of a continuing violation, and the second prosecution related to a period of time not embraced in the first prosecution.

It is well settled that jeopardy attaches only when the second prosecution is for the same offense as the first and that, when the crime is a continuing one, conviction or acquittal bars subsequent prosecution only for offenses during the period considered in the prior case. *United States* v. *Bendik*, 220 F. 2d 249, 251 (2d Cir., 1955); *Self* v. *United States*, 150 F. 2d 745 (4th Cir., 1945); *People* v. *Brooklyn & Queens Transit Corp.*, 283 N. Y. 484, 495, 28 N. E. 2d 925, 930 (1940); *People* v. *Farson*, 244 N. Y. 413, 419, 155 N. E. 724, 726 (1927); *People ex rel. Lichtenstein* v. *Hodgson*, 126 N. Y. 647, 27 N. E. 378 (1891); 22 *C. J. S., Criminal Law* § 281.

This effectively disposes of petitioner's contention. As the Appellate Term stated (A4):

> "His [petitioner's] prior conviction for unauthorized filling-in on October 29, 1969 for which he paid a fine of $50., certainly could not be regarded as permission to maintain the unlawful condition indefinitely. When the violation charged is a continuing one, as here, conviction or acquittal bars later prosecution only for a like offense during the

time specified in the first charge * * *. The instant offense was the condition existing on May 7, 1970 which, of course, is subsequent and completely distinct from October 29, 1969, the time specified in the first charge."*

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* In the "Question Presented" on page 2 of his brief, petitioner lists only one issue on this petition for certiorari, namely, double jeopardy. On page 6 of his brief, however, he appears to raise a second issue when he states that the Appellate Term decision was in conflict with *Appleby* v. *City of New York*, 271 U. S. 364 (1926); and *Appleby* v. *Delaney*, 271 U. S. 403 (1926), involving the application of Article 1, § 10, of the United State Constitution. No constitutional issue involving Article 1, § 10, was raised by petitioner either at trial or in his Appellate Term brief. It is obvious from the opinion at Appellate Term that the court did not consider such an issue. In his Appellate Term brief, petitioner did make statements to the effect that the property in question had been sold by the City without restriction, but he made no claim that the City's regulation of the property violated Article 1, § 10. He stated in his brief (p. 12) that there were two issues at trial, one relating to double jeopardy, and the other involving whether he had complied with the order of the judge at the first criminal trial. As a consequence, this Court cannot consider the issue of Article 1, § 10. *Bryant* v. *Zimmerman*, 278 U. S. 63, 67-68 (1928); *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 655 (1897); *Stern & Gressman, Supreme Court Practice*, § 3.26 (1969).

It is even doubtful whether this Court can consider the issue of double jeopardy. When petitioner raised the issue, he did not make reference to the Federal Constitution.

CONCLUSION

The petition for a writ or certiorari should be denied.

February 23, 1973.

Respectfully submitted,

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